NO. 86-112

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DIANE L. MAURIELLO,

Petitioner,

v.

THE UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, THE GRADUATE SCHOOL OF BIOMEDICAL SCIENCES, GIAMPIERO di MAYORCA, M.D., individually and as Chairperson of the Department of Microbiology, RODNEY ROTHSTEIN, Ph.D., individually and as Chairperson of the Graduate Committee of the Department of Microbiology, VILMA K. JANSONS, Ph.D., jointly and severally,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counter-Statement of the Case

Petitioner, Diane L. Mauriello, was accepted as a student in the doctoral program in microbiology at the respondent University in 1977 (Pa37).* A requirement for the awarding of the Ph.D. degree is the completion and defense of a research dissertation thesis by the student (Pa38). The research necessary for the thesis is conducted by the student in the laboratory of a faculty advisor selected by the student (Pa37 to Pa38). The advisor provides a student with laboratory facilities, funding and guidance and is responsible for evaluating a student's progress (Pa38).

Mauriello completed her course requirements in 1979 and selected Dr. Vilma Jansons as her faculty advisor (Pa37). As required by the Graduate School, Mauriello presented a thesis proposal to Dr. Jansons in 1980 (Pa38). The proposal, however, was not acceptable and revisions were required. Mauriello did not submit a revised proposal until twenty months later (Pa38).

While Dr. Jansons found serious weaknesses in Mauriello's work between 1979 and 1981, she allowed Mauriello to continue because her mother was very ill at the time. Moreover, because of Mauriello's poor background in biochemistry, Dr. Jansons found it difficult to decide if Mauriello would eventually overcome her weaknesses (Ja542 to 543, Ja548).** In 1982, some of Mauriello's

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* Pa refers to petitioner's appendix.

** Ja refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit in the related appeal and cross-appeal on the merits, Appeal Nos. 84-5666 and 84-5720. By order entered on September 25, 1985 the Third Circuit Court of Appeals permitted use of that joint appendix in the appeal and cross-appeal on the award of attorney's fees.

research was incorporated in scientific papers which had been submitted for publication (Pa38). The rejection of the articles led Dr. Jansons to reevaluate Mauriello's work (Pa38). Upon doing so, Jansons found several serious errors in the reported results of experiments conducted by Mauriello and significant errors in the manner in which she conducted research (Ja551-10, Ja193, Ja550-8, Ja552-10 to Ja557-4, Ja653-7 to 17, Ja756-3 to 13). The severity of these errors led Dr. Jansons to advise Mauriello that she would withdraw as her faculty advisor and could no longer sponsor her research (Pa38). Following discussion with Mauriello, Jansons agreed to give her another chance and Mauriello returned to the laboratory on a probationary basis (Pa38). In November, 1982, however Mauriello accepted full-time employment with an outside corporation and limited her work in the laboratory to, at best, a part-time basis (Pa38 to Pa39).

At the end of November, 1982 Jansons sent a note to Mauriello expressing dissatisfaction with her work (Pa39). Inquiring about the status of the corrections of the research errors Mauriello was supposed to have made, Dr. Jansons wrote "[w]here is the change that you said took place this autumn in you and according to you made you worthy of defending a Ph.D. thesis? It was, perhaps different for some weeks after you were put on probation, now it's business as usual—total irresponsibility" (Pa39). In this note, Jansons also advised Mauriello that the corrections were needed by a certain date in order to complete a presentation that was to be given on December 2, 1982 (Pa39). On November 26, 1982 Jansons and Mauriello met in Jansons' office at which time Mauriello did not have the corrections, told Jansons that she did not need the corrections and offered other excuses for not having com-

pleted the work. After listening to Mauriello, Jansons informed her that she would no longer sponsor her research (Ja569-8 to Ja571-5, Ja192).

In a memorandum dated December 15, 1982 Jansons informed Dr. Rothstein, Chairman of the Department's Graduate Committee, that she would not sponsor Mauriello's research after January 1, 1983 and further advised Dr. Rothstein that Mauriello had "assured me that her performance would improve and, if not, she would withdraw from the graduate school. There has not been any improvement" (Pa39). It is uncontradicted that a graduate student at this stage of the doctoral program cannot continue in the program without a faculty advisor and that Mauriello was aware of this requirement. It is also uncontradicted that Mauriello took no steps at this time to secure another faculty advisor and that no committee or individual at the University has the authority to compel a faculty member to serve as an advisor (Ja691-23, Ja 355-24 to Ja356-1, Ja360-20 to Ja361-1, Ja698-11, Ja650-17 to Ja651-7, Ja705-25, Ja702-16).

Instead of seeking another faculty advisor, Mauriello approached the chairman of the department's Graduate Committee, Dr. Rothstein, concerning her situation with Dr. Jansons (Pa39). The Graduate Committee serves as an advisory body to the Chairman of the Department but does not have the authority to appoint a faculty advisor (Ja698-12). Dr. Rothstein was given the impression by Mauriello that she was almost finished with her thesis. He agreed to convene the Committee in January, 1983 in an effort to mediate the dispute and, according to his testimony, advised Mauriello to bring data to the committee meeting to corroborate her statement that her

thesis was almost finished (Ja695-18 to Ja696-22). The precise instructions given to Mauriello as to what material she was to present at the meeting are disputed with Mauriello testifying that she was told to bring only data on the research errors she claimed had been corrected and on extraneous non-thesis research she had done in Jansons' laboratory (Pa39).

It is undisputed that Mauriello was not prepared to give a presentation of her thesis at the January meeting and that the Committee agreed to convene again on February 2, 1983 for the presentation (Pa39). It is further undisputed that the Committee then met with Dr. Jansons who described the nature of the errors committed by Mauriello and that, following this meeting, a tentative decision to dismiss plaintiff from the program was made pending her presentation before the Committee on February 2, 1983 (Pa40).

It is further undisputed that Mauriello appeared at the February 2, 1983 meeting unprepared to give the thesis presentation expected by the Committee (Pa40). Again, she testified that she had not been instructed to do so but rather to present non-thesis research she had accomplished. Since she did not have the requested material, the committee scheduled a third meeting (Pa40). Several days later, Mauriello admittedly contacted the chairman of the Department, Dr. di Mayorca, and told him that she would be unable to make the presentation because Jansons possessed much of her material (Pa40). Dr. Jansons, however, denied having any of Mauriello's material (Ja546-10 to 18). More importantly, it was inconceivable to Dr. di Mayorca that Mauriello did not have her data since graduate students normally possess several

copies of data from experiments they conduct and it is always the student's responsibility to maintain their research notebook (Pa40). Dr. di Mayorca advised the committee members that Mauriello was unable to produce the requested material and a majority of the Committee adopted the previously tentative decision to dismiss (Pa 40). On February 14, 1983 Dr. Rothstein, on behalf of the Committee, advised Mauriello that the Committee had notified the graduate school that she was no longer a Ph.D. candidate in the Department of Microbiology (Pa 40).

On June 9, 1983 Mauriello instituted suit in the Federal District Court of New Jersey pursuant to 42 U.S.C. §1983 asserting that her procedural and substantive due process rights had been violated. Following a jury verdict in Mauriello's favor, the district court judge entered an order on August 28, 1984 which, inter alia, directed the parties to agree on selection of an ad hoc committee to review Mauriello's thesis research material (Pa41). Respondents' motion for a stay of the injunctive order was denied by the district court on August 28, 1984 (Pa35). On September 28, 1984 respondents filed a Notice of Appeal and on October 12, 1984 petitioner filed a Notice of Cross Appeal from the judgment and order of the District Court (Ja1 to Ja4). While the matter was pending before the United States Court of Appeals for the Third Circuit, Mauriello made her presentation to the Ad Hoc Committee. After reviewing the material and her presentation, the Ad Hoc Committee rendered its unanimous decision on October 9, 1985 that Mauriello's research was "not of [sic] good scientific quality and Ph.D. caliber" (Pa41).

On appeal the Circuit Court reversed the judgment in favor of petitioner, holding that it was error to submit the case to the jury because petitioner's proof was insufficient to survive respondents' motion for a directed verdict. 781 F.2d 46 (3d Cir. 1986) (Pa45). Viewing all the facts in the light most favorable to petitioner, the court concluded that "under the applicable law [she] failed to present sufficient evidence to establish a claim" and accordingly the Circuit Court ordered judgment entered in favor of respondents (Pa45 to Pa46, Pa49).

While the appeal on the merits was pending before the Circuit Court, the District Court had entered an order on May 22, 1985 awarding Mauriello attorney's fees and costs in the total amount of $61,089.06 (Pa1 to Pa2). On June 11, 1985 Mauriello filed a notice of appeal and on June 14, 1985 respondents filed a notice of cross-appeal from the order awarding fees and costs (Pa26). On April 25, 1986 the Circuit Court reversed the order awarding fees, concluding that its reversal in the merits appeal rendered Mauriello a non-prevailing party for purposes of 42 U.S.C. §1988 (Pa26). On May 19, 1986 Mauriello filed a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit seeking review of the Circuit Court's reversal on the merits. 54 U.S.L.W. 3848 (July 24, 1986). On July 24, 1986 Mauriello filed the instant petition for writ of certiorari seeking review of the Circuit Court's reversal of the award of attorney's fees.

Summary of Argument

The writ sought herein should be denied because petitioner failed to demonstrate that the decision of the United States Court of Appeals for the Third Circuit is erroneous or conflicts with any holdings of this Court or any other circuit court of appeals. Rather, the decision of the Circuit Court that petitioner is not a prevailing party because the judgment and order in her favor at the trial level were erroneously entered correctly applied the governing law and is consistent with the holdings in other circuits. Petitioner did not achieve any significant relief as a result of this litigation and even if she had, she would not be entitled to attorney's fees since that relief was awarded under a mistake of law. Petitioner's claim that she is entitled to an award of fees because the judgment in her favor was reversed as a result of a change in the law is unsupported by case law or logic. Moreover, this contention is without merit since the relief she achieved was improperly ordered by the trial court in light of the then existing law. For these reasons, no basis exists for granting review of the writ of certiorari.

ARGUMENT

The writ should be denied because the decision of the United States Court of Appeals for the Third Circuit reversing the award of attorney's fees was correctly decided.

It is axiomatic that Congress intended fees to be awarded under 42 U.S.C. §1988 "only when a party has prevailed on the merits of at least some of his claims." *Hanrahan* v. *Hampton,* 446 U.S. 754, 758 (1980). "In order to be a 'prevailing party,' a plaintiff must have been entitled to some form of relief at the time suit was brought." *Harrington* v. *Vandalia-Butler Board of Education,* 585 F.2d 192, 197 (6th Cir. 1978), *cert. denied* 441 U.S. 932 (1979). Thus, in order to be entitled to attorney's fees "a party must establish in *an enduring way* that he or she was right on a matter in issue and that the litigation activities served to establish the existence of the right or contributed to an enjoyment of the right." *Smith* v. *University of North Carolina,* 632 F.2d 316, 346 (4th Cir. 1980) (emphasis added). A plaintiff who receives a favorable final judgment or order at the trial level which is reversed entirely on appeal cannot be viewed as establishing "in an enduring way" that he or she was right on a matter in issue. Rather, as held in *Harris* v. *Pirch,* 677 F.2d 681, 689 (8th Cir. 1982), a reversal of a judgment in favor of a plaintiff in a civil rights action completely negates an award of attorney's fees to the plaintiff since the plaintiff cannot be viewed as a "prevailing party." See also, *Lowman* v. *Davies,* 704 F.2d 1044, 1046 (8th Cir. 1983) (award of attorney's fees in civil rights action reversed after court of appeals reversed on the merits a judgment in favor of plaintiff).

Petitioner contends, however, that she is a prevailing party despite the appellate court's complete reversal of the judgment in her favor because she claims to have achieved the objectives of her litigation in the form of a hearing before the Ad Hoc Committee and because the reversal, according to petitioner, was based on a "change of law subsequent to the issuance of the permanent injunction" (Petition at page 7). Neither of these contentions has any merit and do not establish petitioner as a prevailing party entitled to attorney's fees.

While it is certainly true that a plaintiff need not prevail ultimately on every claim asserted or receive all the requested relief in order to be considered a prevailing party, it is just as true that prevailing party status cannot be claimed "by virtue of any success during the course of a civil rights case." *Doe* v. *Busbee,* 684 F.2d 1375, 1379-1380 (11th Cir. 1982). Contrary to her assertion, petitioner did not achieve the relief she sought in this litigation. In her complaint, petitioner did not even seek a hearing but rather demanded immediate reinstatement into the Ph.D. program, compensatory and punative damages and certain restraints against the individual defendants (Ja21 to Ja22). She has achieved none of this relief. Thus, this case is easily distinguished from *Bagby* v. *Beal,* 606 F.2d 411 (3d Cir. 1979), which petitioner erroneously contends is inconsistent with the Circuit Court's decision in this matter. In *Bagby,* the only relief sought by the plaintiff was a hearing. By the time the appeal was heard, the hearing had been completed and the court thus held the appeal to be moot. *Id.* at 415. Since the appeal was moot, thereby eliminating any decision on the merits, it was concluded that plaintiff had prevailed. *Ibid.* Unlike *Bagby,* in which no appellate decision

on the merits was rendered, the Circuit Court reached the merits in this case and held that the judgment and order in plaintiff's favor were legally erroneous.

Moreover, even if it is assumed that petitioner achieved some of the relief she sought in the form of the hearing before the Ad Hoc Committee she would nevertheless not be entitled to attorney's fees. Firstly, in order to be entitled to an award of fees a plaintiff must have "succeeded on the central issue, as exhibited by the fact that he has obtained the primary relief sought." *Taylor* v. *Sterrett,* 640 F.2d 663, 669 (5th Cir. 1981). The primary relief sought by petitioner was reinstatement to the program and damages and she did not obtain this relief. More importantly, the circuit courts which have decided the question at issue here "have concluded that where a plaintiff receives a favorable ruling on the merits of his claim, but that ruling is later vacated or reversed on the merits, the plaintiff is not entitled to attorney's fees as a prevailing party." *Doe* v. *Busbee, supra,* 684 F.2d at 1380; see *Frazier* v. *Bd. of Trustees of Northwest Miss.,* 765 F.2d 1278, on petition for reh'g, 777 F.2d 329 (5th Cir. 1985); *Lowman* v. *Davis, supra; Harris* v. *Pirch, supra; Smith* v. *University of North Carolina, supra; Harrington* v. *Vandalia-Butler Board of Education, supra.*

Fees have been denied in these cases even in instances where the plaintiffs had achieved some relief in the trial courts. *Doe* v. *Busbee, supra,* 684 F.2d at 1377-78; *Smith* v. *University of North Carolina, supra,* 632 F.2d at 352-53. For example, in *Doe* v. *Busbee, supra,* plaintiffs had obtained final injunctive and declaratory relief requiring Medicaid reimbursement for abortions. 684 F.2d at 1377. While the case was pending on appeal, this Court rendered two decisions which undercut the district court's

decision. The court of appeals remanded the case to the district court which vacated the final judgment and dismissed the complaint. However, the district court refused to vacate its prior award of attorney's fees, reasoning that plaintiffs had achieved substantial relief since during the interim period over 1800 women had received medicaid reimbursed abortions. *Id.* at 1381. On appeal, the Eleventh Circuit reversed the award of fees, holding that plaintiffs were not prevailing parties since they "ultimately did not prevail on a single legal issue in the case. . . . [t]heir successes were merely temporary, and any benefit flowing from their success in the district court was awarded under a mistake of law." *Ibid.* Similarly, any success achieved by petitioner in this matter "was awarded under a mistake of law" and she cannot therefore be considered a prevailing party.

Petitioner further suggests that she is entitled to fees because the judgment in her favor was reversed based on "an outcome-determination change of law subsequent to the issuance of the permanent injunction" (Petition at page 7). No case law support is cited for this proposition and the argument is directly at odds with the holding in *Doe* v. *Busbee, supra,* which denied fees even though the reversal on the merits was caused by intervening decisions of this Court. 684 F.2d at 1377. Moreover, the contention that the Court of Appeals' decision in this case was based on a "new legal pronouncement in *Ewing*" is misleading. Petitioner's claim to entitlement to fees is predicated on the relief she achieved in the form of a hearing. The hearing was ordered by the district court as a remedy for the preceived violation of petitioner's procedural due process rights. *Regents of the University of Michigan* v. *Ewing,* 474 U.S. ——, 88 L. Ed. 2d 523 (1985),

decided while the present matter was pending before the Court of Appeals, did not concern precedural due process rights but rather substantive due process rights of students facing academic dismissals. As to the procedural requirements in academic dismissals, this Court had determined long before petitioner's complaint had even been filed in 1983 that the type of formal hearing mandated by the district court is not a constitutional requirement. *Board of Curators, Univ. of Mo.* v. *Horowitz,* 435 U.S. 78 (1978). Thus, even if petitioner's argument had any merit, it would not apply to the facts of this case. Finally, as regards this argument, it cannot be said that this Court's decision in *Ewing* reflected a drastic or unanticipated change in law. Rather, the *Ewing* decision was clearly forecasted in this Court's opinion in *Horowitz* wherein it was emphasized that

> Courts are particularly ill-equipped to evaluate academic performance. The factors discussed [above] with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decision-making [435 U.S. at 92].

As is clear from the above discussion, the Court of Appeals correctly reversed the award of attorney's fees to petitioner. Moreover, petitioner's attempt to demonstrate a conflict among circuit court decisions sufficient to justify review by this Court is unconvincing and erroneous. The only case cited by petitioner to demonstrate a conflict is *Coalition for Basic Human Needs* v. *King,* 691 F.2d 597 (1st Cir. 1982). This decision by the First Circuit, however, involved a completely different factual setting than the instant case and those cited above. In *Coalition*

the plaintiffs obtained a preliminary injunction on appeal "that effectively determined the parties' rights," even though events then made it unnecessary for the injunction to ever take effect. 691 F.2d at 601. There never was, as in this case, a subsequent determination that the injunction was erroneously issued. Thus, the plaintiffs were deemed prevailing since they had established their "entitlement to some relief on the merits . . . on appeal." *Ibid.* (quoting *Hanrahan* v. *Hampton, supra,* 446 U.S. at 756-58). In contrast, petitioner has not shown any entitlement to relief on the merits of her claims.

Since the Third Circuit Court of Appeals correctly reversed the award of attorney's fees and that reversal is consistent with the holdings of the other circuits which have decided the issue there is no justification for seeking plenary review by this Court. As stated in *Smith* v. *University of North Carolina, supra,* the position advanced by petitioner

> would . . . requir[e] a defendant, who prevailed on the merits, to finance a plaintiff's unsuccessful claim against him. There is nothing in the statute to suggest that an innocent defendant should be assessed a portion of a plaintiff's litigation costs.
>
> Litigation is not without its financial risks. A fully successful defendant should not be required to reimburse an unsuccessful plaintiff for his legal gamble [632 F.2d at 353].

While public policy encourages vindication of constitutional rights, it does not require innocent defendants to pay for nonmeritorious claims of constitutional violations. Petitioner's attempt to have defendants finance her unsuccessful litigation against them should be rejected by this Court.

CONCLUSION

For the above stated reasons, it is respectfully submited that the petition for certiorari should be denied.

Respectfully submitted,

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By: Barbara A. Harned
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Dated: August 22, 1986